There is no consistency in allowing the vendor to enter into a competitive business then to bar him from the most effective means of success; to allow him to diminish the good will sold by advertising but not by solicitation.[9] Yet this restriction was recently enforced by the New York Court of Appeals in reversing the ruling of the Appellate Division.[10] *Von Bremen* v. *MacMonnies*, 200 N. Y. 41.

In theory these personal restrictions are usually considered as implied agreements by the vendor, not as incidents to the transfer of the property rights.[11] So when the transfer is involuntary, as through the trustee in bankruptcy, all courts leave the vendor as free as an outsider to re-engage in business.[12] But from the facts in the cases it appears that most courts have been inclined to lay down practically a rule of law that the restrictions discussed will or will not be "implied" in the voluntary sale of good will, thus making possible the classification above outlined. This error in practice has been caused in this country by following too closely the cases in England. It was there early established,[13] though since frequently regretted,[14] that the restraint which seems the most natural one, against establishing a competing business, could never be implied. Not free always to enforce the actual intent of the parties, the courts in their anxiety to protect the purchasers now apply their half-way measure with apparently undiscriminating regularity.[15] But the courts in this country, not bound by the English precedents, should have no such hard and fast rules to apply to the sale of so intangible and variable a thing as good will, and should endeavor to protect the purchaser to the full extent intended in each case and no further.

HABIT AS EVIDENCE OF AN ACT. — Habit, as evidence, shades off into (1) similar occurrences, (2) character, (3) custom, which may be regarded as a sort of composite habit of a group of persons. The distinctions between these topics can be made clear more easily by illustrations than by definitions. Suppose the issue to be whether X was intoxicated on a particular Saturday night. Evidence that he was seen to drink at some other particular time would be evidence of a similar occurrence. That he was temperate in all things would be evidence of character. That in his social set, banquets were invariably closed by drinking a toast to the King in whisky straight would be evidence of custom. That he spent his wages for liquor every Saturday night, or that he became intoxicated occasionally would be evidence of habit.

Habit may sometimes be shown to prove either what act a given person did, or what person did a given act. Evidence of handwriting

[9] See Williams *v.* Farrand, *supra.*

[10] *Accord*, Von Bremen *v.* MacMonnies, 138 N. Y. App. Div. 319. Similar recent New York decisions are: Kates *v.* Bok, 139 N. Y. App. Div. 640. *Contra*, Goetz *v.* Ries, 123 N. Y. Supp. 433.

[11] See Hutchinson *v.* Nay, 187 Mass. 262, 265; Ginesi *v.* Cooper, 14 Ch. Div. 596, 600.

[12] Hutchinson *v.* Nay, *supra;* Walker *v.* Mottram, 19 Ch. Div. 355. But the involuntary vendor is bound to refrain from unfair competition. Hudson *v.* Osborne, 39 L. J. Ch. N. S. 79.

[13] Cruttwell *v.* Lye, 17 Ves. 335. See Harrison *v.* Gardner, 2 Madd. 198, 219.

[14] See Harrison *v.* Gardner, *supra;* Trego *v.* Hunt, *supra.*

[15] Jennings *v.* Jennings, [1898] 1 Ch. 378; Gillingham *v.* Beddow, [1900] 2 Ch. 242; Curl Bros. Ltd. *v.* Webster, *supra.*

belongs in this second class. The admissibility of evidence of habit depends largely on its remoteness. The habit of occasional intoxication is logically relevant. It makes a belief that X was drunk on the particular occasion more likely, but more likely by so little that the evidence is hardly worth the time consumed in hearing it. Hence it is often excluded.[1] Proof of a habit of invariably doing the same thing under circumstances like those of the case at issue is less remote and hence more likely to be admitted. This is most frequently true of acts that are largely mechanical, as mailing letters left in a certain place,[2] or of acts without moral significance, as spelling a word a certain way,[3] and which are therefore the subjects of the strongest habits; or of business transactions, as accepting drafts in writing only,[4] for men are generally more methodical about their business than about other affairs. Since strength of habit depends partly on frequent repetition, that too has a bearing on probative value. Thus the practice of getting drunk every Saturday night might be admitted by a court which would exclude evidence of so doing every New Year's Eve. Again, remoteness varies inversely with the definiteness of the circumstances under which the act is habitually done; for the vaguer these circumstances are the harder it is to say that there is any habit as distinguished from mere coincidence. These matters are all questions of degree; the decisions are by no means uniform; and in each case the discretion of the judge should play a large part.

Once having determined that the habit is competent evidence of the act, the court applies the same rules to evidence of the habit as to evidence of any other relevant fact. A recent Pennsylvania case introduces a further refinement peculiar to this point. *Moyer* v. *Berndt*, 19 Pa. Dist. R. 869 (Pa., C. P., Berks Co.). Following earlier *dicta* [5] it holds that habit is not admissible to prove an act, unless there is also direct evidence of the act, but concedes that it would be admissible to corroborate direct evidence. The use of habit as a substitute for the witness' present recollection may be compared with the use of a contemporary record for the same purpose. In the absence of present recollection, a witness may testify that he did the act because it was his invariable habit to do so, or because he had entered a record of the transaction.[6] The record alone would be kept out by the hearsay rule; but that does not apply to the habit standing alone. Indeed, it is hard to see a reason for the principal decision, unless the habit was such remote evidence that without more no reasonable jury could find that the act was done.[7]

QUO WARRANTO AND MANDAMUS FOR OFFICES AT WILL. — The books contain many conflicting rules regarding jurisdiction to issue the writ of

[1] Kingston *v.* Ft. Wayne, etc., Co., 112 Mich. 40. *Contra*, Smith's Executor *v.* Smith, 67 Vt. 443

[2] Bell *v.* Hagerstown Bank, 7 Gill (Md.) 216.

[3] Brookes *v.* Tichborne, 5 Exch. 929.

[4] Smith *v.* Clark, 12 Ia. 32.

[5] See Meighen *v.* The Bank, 25 Pa. St. 288; Eureka Insurance Co. *v.* Robinson, 56 Pa. St. 256.

[6] Shore *v.* Wiley, 18 Pick. (Mass.) 558.

[7] On very similar facts, the evidence was admitted in Lucas *v.* Novosilieski, 1 Esp. 296.